IN THE

Supreme Court of the United States

OCTOBER TERM, 1950.

No. 486.

PANHANDLE EASTERN PIPE LINE COMPANY,
Appellant,

vs.

MICHIGAN PUBLIC SERVICE COMMISSION and MICHIGAN CONSOLIDATED GAS COMPANY,
Appellees.

APPEAL FROM THE SUPREME COURT OF THE STATE OF MICHIGAN

BRIEF FOR APPELLANT.

ROBERT P. PATTERSON,
ROBERT M. MORGENTHAU,
No. 1 Wall Street,
New York 5, New York.

CLAYTON F. JENNINGS,
1400 Olds Tower Building,
Lansing, Michigan,
Attorneys for Appellant.

Pandick Press, Inc., 22 Thames St., New York 6, N. Y., U. S. A.

INDEX.

TABLE OF CITATIONS.

Cases.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1950.

No. 486.

PANHANDLE EASTERN PIPE LINE COMPANY,
Appellant,

vs.

MICHIGAN PUBLIC SERVICE COMMISSION and
MICHIGAN CONSOLIDATED GAS COMPANY,
Appellees.

APPEAL FROM THE SUPREME COURT OF THE STATE OF MICHIGAN

BRIEF FOR APPELLANT.

Opinions Below.

The appeal is from a final judgment of the Supreme Court of Michigan, with opinion (R. 557-569) and dissenting opinion (R. 569-574) reported in 328 Mich. 650.

Jurisdiction.

Jurisdiction of this Court to review the judgment is invoked under 28 U. S. C., Section 1257 (2), the appeal drawing into question the validity of a Michigan statute and order on the ground of repugnancy to the Constitution of the United States. Probable jurisdiction was noted by this Court on February 26, 1951 (R. 579-580).

Broadly, the question is whether a state has power, consistently with the Commerce Clause of the Constitution, to prohibit sales of natural gas in interstate commerce by an interstate pipe-line company direct to industrial consumers in the state.

This is the first case, we believe, where a state has ever asserted and sought to enforce such power, although direct sales of natural gas in interstate commerce to industrial consumers are and long have been standard practice throughout the natural gas industry.

Statement.

Panhandle owns and operates a natural gas pipe line stretching from gas wells in Texas, Oklahoma and Kansas to Michigan (Exh. 1, R. 356). It transports natural gas in interstate commerce. The greater part of its natural gas it sells to local utilities for distribution and resale to consumers. A much smaller part it sells direct to industrial consumers, such sales being known as "direct industrial sales" in the natural gas industry. It is a "natural gas company" within coverage of the Natural Gas Act (15 U. S. C., Section 717 ff.) and is subject to regulation by the Federal Power Commission to the extent provided in the Natural Gas Act (R. 255-257).

Contract with Ford Motor Company. In October 1945 the company made a contract to transport, sell and deliver, direct from its main line, 25 million cubic feet of natural gas a day to the Ford Motor Company at Dearborn, Michigan, for the Ford Company's own consumption in its industrial plant,—a "direct industrial sale". Deliveries were to be on an interruptible rather than a firm basis, as was the case with all of Panhandle's direct industrial sales (R. 10-16).

The Ford plant is located in a municipality already served with gas by Michigan Consolidated Gas Company, an intervening defendant and one of the appellees (R. 259-260).

Panhandle also offered to sell natural gas direct to several other industrial consumers in Michigan (R. 263; 267; 279).

Order of Michigan Public Service Commission. On February 19, 1946 the Michigan Public Service Commission (after complaint by Michigan Consolidated, notice and hearing) issued an order (R. 32-33) commanding Panhandle to

> "cease and desist from making direct sales and deliveries of natural gas to industries within the State of Michigan, located within municipalities already being served by a public utility, until such time as it shall have first obtained a certificate of public convenience and necessity from this Commission to perform such services."[1]

The Commission purported to act (R. 24-25) under Section 2 of Act 69 of the Public Acts of Michigan of 1929 (22.142 Mich. Stat. Ann.; C. L. 1948 Sec. 460.502):

> "No public utility shall hereafter begin the construction or operation of any public utility plant or system thereof nor shall it render any service for the purpose of transacting or carrying on a local business either directly, or indirectly, by serving

[1] The Commission in its opinion (R. 21-32) conceded that under the Commerce Clause the State

> "is deprived of the power to impose as a condition upon the right to act in interstate commerce the requirement of obtaining a certificate of public convenience and necessity." (R. 25).

It based its order on the ground that the proposed sale of natural gas direct to consumers was "local business and is intrastate in character" (R. 28).

> any other utility or agency so engaged in such local business, in any municipality in this state where any other utility or agency is then engaged in such local business and rendering the same sort of service, or where such municipality is receiving service of the same sort, until such public utility shall first obtain from the Commission a certificate that public convenience and necessity requires or will require such construction, operation, service, or extension."

On certificates of public convenience and necessity, the Michigan statutes provide (Act 69 of Public Acts of 1929; Sections 22.143 and 22.145 Mich. Stat. Ann.; C. L. 1948, Secs. 460.503 and 460.505):

> "Sec. 3. Before any such certificate of convenience and necessity shall issue, the applicant therefor shall file a petition with the commission stating the name of the municipality or municipalities which it desires to serve and the kind of service which it proposes to render, and that the applicant has secured the necessary consent or franchise from such municipality or municipalities authorizing it to transact a local business."
>
> • • • • • •
>
> "Sec. 5. In determining the question of public convenience and necessity the commission shall take into consideration the service being rendered by the utility then serving such territory, the investment in such utility, the benefit, if any, to the public in the matter of rates and such other matters as shall be proper and equitable in determining whether or not public convenience and necessity requires the applying utility to serve the territory. • • • "

Review of Commission's order in Michigan courts. Panhandle, looking to the State courts for relief and following Michigan procedure, brought suit in the Circuit Court of

Ingham County for review of the Commission's order. It pressed the point (as it had before the Commission) that the sale to Ford Motor Company was a sale of natural gas in interstate commerce and that the prohibitory order of the Commission was in violation of the Commerce Clause[2] (R. 5-8).

The Circuit Court vacated the Commission's order (R. 312). It held that the sale of natural gas in question was a sale in interstate commerce, and that while a sale to a direct industrial consumer was subject to State regulation on rates, the right of the State to regulate did not embrace the power to prohibit (R. 309-311).

The Michigan Supreme Court reversed the judgment of the Circuit Court and affirmed the Commission's order (328 Mich. 650). The ground taken by the majority opinion was that while the sale was in interstate commerce, the Commission's order commanding Panhandle to cease and desist from making such sales fell within the State's regulatory authority over interstate commerce in natural gas (R. 557-569).

Three justices dissented (R. 569-574).

Assignment of Error.

The Michigan Supreme Court erred:

In upholding the validity of a Michigan statute (Act 69, Section 2 of the Public Acts of 1929) and an order of the Michigan Public Service Commission entered thereunder on February 18, 1946, which, as construed by that court, prohibit the sale of natural gas in transit in interstate commerce by an interstate natural gas pipe line company di-

---

[2] "The Congress shall have Power * * * To regulate Commerce with foreign Nations, and among the several States, and with the Indian tribes; * * *" *Constitution*, Article I, Section 8.

rectly to an industrial consumer in a municipality already served without first obtaining a certificate of public convenience and necessity, against the claim of appellant that they contravene the Commerce Clause of the Constitution of the United States (R. 577).

Summary of Argument.

The Michigan statute provides that no utility shall render service in a municipality already served by another utility, except on certificate of public convenience and necessity first obtained from the Public Service Commission.

The Michigan Supreme Court, by the judgment appealed from, has ruled that this statute applies to sale and delivery of natural gas in interstate commerce made by an interstate pipe-line company directly to an industrial consumer. No such sale and delivery, so it is held, may be made save on leave granted by the Commission.

It is our position that the state statute, so construed and applied to sales of natural gas in interstate commerce, violates the Commerce Clause.

The heads of argument are:

1. The states—while they have authority to regulate rates and other local incidents in sales of natural gas in interstate commerce by an interstate pipe line company directly to industrial consumers—have not the authority to prohibit such sales in interstate commerce or to make state consent a condition precedent to such sales.

2. Particularly is this the case where, as here, the purpose of impeding or obstructing interstate commerce in natural gas is to protect local commerce from competition or to serve other economic interests of a state.

3. The national interest in the unimpeded flow of natural gas from state to state outweighs the local interest

in restricting competition. The local authority insisted on here would seriously disrupt interstate commerce in a major industry.

4. The power asserted and acted on by the State, while on its face a power to permit or to prohibit sales of natural gas in interstate commerce, would also control transportation of natural gas in interstate commerce. Control of interstate transportation of natural gas has been committed by act of Congress to the Federal Power Commission, to the exclusion of interference by state agencies.

Leading cases, we submit, support each of the foregoing points.

ARGUMENT.

I.

The transmission and sale of natural gas in this case constituted interstate commerce.

The case is one where natural gas produced in Texas, Oklahoma and Kansas is transported in continuous flow by means of pipe line and is sold in transit and delivered by the pipe-line carrier directly to an industrial consumer in Michigan. The point of delivery to the Ford Motor Company was 18 feet from the main transmission line of Panhandle (Exh. 1, R. 356; R. 292-295; 306).

That such transportation and sale constitute interstate commerce cannot be open to serious question.

Illinois Natural Gas Co. v. *Central Illinois Public Service Co.*, 314 U. S. 498 (1942);

Interstate Natural Gas Co. v. *Federal Power Commission*, 331 U. S. 682 (1947);

Panhandle Eastern Pipe Line Company v. *Indiana Public Service Commission*, 332 U. S. 507 (1947), at pages 512-513.

II.

The Michigan statute, as construed and applied by the Michigan Supreme Court, prohibits interstate commerce in natural gas and violates the Commerce Clause.

At the outset we are bound to acknowledge the authority of the states to regulate *rates* in sales of natural gas in interstate commerce when made by an interstate pipe-line carrier directly to industrial consumers. Specifically, the Michigan Commission has power to regulate the rate on sale of natural gas by Panhandle to the Ford Motor Company for its own consumption. Any uncertainty on that head was removed by *Panhandle Eastern Pipe Line Co.* v. *Indiana Public Service Commission, supra.*

As expounded in that case, the point was settled, prior to passage of the Natural Gas Act in 1938, that sales of natural gas in interstate commerce made directly to consumers by an interstate carrier were subject to state regulation on rates. *Pennsylvania Gas Co.* v. *New York Public Service Company,* 252 U. S. 23 (1920). On the other hand, sales of natural gas in interstate commerce made to local distributors for later resale to consumers were beyond reach of state regulation. *Missouri* v. *Kansas Natural Gas Co.,* 265 U. S. 298 (1924). The distinction was well understood.

The Natural Gas Act of 1938 continued the same distinction. The Act, while it conferred authority on the Federal Power Commission as a federal agency to regulate transportation of natural gas in interstate commerce and also sales in interstate commerce for resale for ultimate consumption, did not touch sales of natural gas in interstate

commerce made directly to consumers.[3] That right of regulation was left to the states, as broadly as it had existed before passage of the Act. In other words, Congress did not occupy the entire field of interstate commerce in natural gas open to federal regulation, but only a part of the field. *Panhandle Eastern Pipe Line Co.* v. *Indiana Public Service Commission, supra,* at page 519.

Regulation of rates in sales of natural gas in interstate commerce when made directly to the consumer is matter of local concern. While interstate commerce may be incidentally affected, state regulation of rates does not sensibly impede the flow of natural gas in interstate commerce. In short, rate regulation in such cases is a local concern within the rule of *Cooley* v. *Board of Port Wardens,* 12 How. 299 (1851). It is comparable to state regulation of the width and weight of motor trucks on state highways—valid in the absence of Congressional action, even though interstate traffic is indirectly affected. *South Carolina Highway Department* v. *Barnwell Brothers,* 303 U. S. 177 (1938).

The present case, however, raises no question of the power of a state to regulate rates in sales of natural gas.

The question is whether a state has authority to prohibit the sale and delivery of natural gas in interstate commerce by an interstate pipeline to an industrial consumer.

The question is as broad as that. For if a state has authority to issue an order to "cease and desist" unless a certificate of public convenience and necessity is obtained,

---

[3] The Natural Gas Act, in section 1(b), provides that the act shall apply:

> "to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use, * * * but shall not apply to any other transportation or sale of natural gas * * *."

the certificate being discretionary with a state agency, then the state has insisted on the right to prohibit the sale altogether.

Plainly, the exercise of any such local authority runs counter to the Commerce Clause.

By a long line of decisions of this Court, a state may not require that a discretionary license or certificate of public convenience and necessity be obtained as a condition precedent to the right to engage in interstate commerce. We cite a few of the leading cases.

> *Crutcher* v. *Kentucky*, 141 U. S. 47 (1891);
> *Barrett* v. *New York*, 232 U. S. 14 (1914);
> *Sault Ste. Marie* v. *International Transit Co.*, 234 U. S. 333 (1914);
> *Mayor of Vidalia* v. *McNeely*, 274 U. S. 676 (1927).

See also

> *Sprout* v. *City of South Bend*, 277 U. S. 163, 171 (1928).

In the *Barrett* case, *supra*, a New York ordinance requiring express companies to take out a local license as a condition to doing business was held invalid under the Commerce Clause as applied to express companies engaged in interstate commerce. Mr. Justice Hughes said (p. 31):

> "Local police regulations cannot go so far as to deny the right to engage in interstate commerce, or to treat it as a local privilege, and prohibit its exercise in the absence of a local license."

In the *Sault Ste. Marie* case, *supra*, an ordinance prohibited operation of ferry boats across St. Mary's River to Canada without first obtaining a license. It was held

that the ordinance was in violation of the Commerce Clause. Mr. Justice Hughes pointed out the distinction between the power to regulate rates and the power to prohibit (pp. 339-340):

> "It will be observed that the question is not simply as to the power of the state to prevent extortion and to fix reasonable ferry rates from the Michigan shore; it is not as to the validity of a mere police regulation governing the manner of conducting the business in order to secure safety and the public convenience, (See *Port Richmond & B. Pt. Ferry Co.* v. *Hudson County*, decided this day (234 U. S. 317), ante 1330, 34 Sup. Ct. Rep. 821). The ordinance goes beyond this. The ordinance requires a municipal license; and the fundamental question is whether, in the circumstances shown, the state, or the city, acting under its authority, may make its consent a condition precedent to the prosecution of the business. If the state, or the city, may make its consent necessary, it may withhold it. * * *
>
> "This question must be answered in the negative."

Further on in the opinion Mr. Justice Hughes said (p. 341):

> "The fundamental principle involved has been applied by this court in recent decisions in a great variety of circumstances, and it must be taken to be firmly established that one otherwise enjoying full capacity for the purpose cannot be compelled to take out a local license for the mere privilege of carrying on interstate or foreign commerce" (citing many cases).

In the *Vidalia* case, *supra*, the town of Vidalia, Louisiana, exacted a license for operating a public ferry between that town and Natchez, Mississippi. It was held that the

ordinance was repugnant to the Commerce Clause. Mr. Justice Van Devanter, writing for the Court, said (274 U. S. at p. 683):

> "The question is not whether the town may fix reasonable rates applicable to ferriage from its river front or may prescribe reasonable regulations calculated to secure safety and convenience in the conduct of the business, but whether it may make its consent and license a condition precedent to a right to engage therein. This we hold it may not do."

In *Panhandle Eastern Pipe Line Co.* v. *Indiana Public Service Company, supra,* Mr. Justice Rutledge took note of the difference between the power of the states to regulate interstate commerce and the power to prohibit. He wrote (332 U. S., at pp. 522-523):

> "State power to regulate interstate commerce, wherever it exists, is not the power to destroy it, unless Congress has expressly so provided."

In *Sprout* v. *City of South Bend, supra,* the Court said, Mr. Justice Brandeis delivering the opinion (277 U. S. at p. 171):

> "The privilege of engaging in such commerce is one which a State cannot deny."

In the above cases, as in the present case, the requirement of certificate or license was imposed squarely on those engaged in interstate transportation,—express companies, ferries, interstate busses. The power claimed by the state was the power in its own discretion directly to obstruct the movement of interstate traffic, and for reasons unconnected with health, safety, convenience or protection from fraud or overreaching.

The strength of these decisions is not impaired by cases sustaining the validity of state statutes that require a

license of a routine kind from brokers or agents who perform services essentially local, somewhere out on the fringes of interstate traffic. *California* v. *Thompson*, 313 U. S. 109 (1941); *Union Brokerage Co.* v. *Jensen*, 322 U. S. 202 (1944); *Robertson* v. *California*, 328 U. S. 440 (1946). As shown in the *Thompson* case, where a California statute was sustained requiring transportation brokers to submit proof of good character and to procure a license,

> "The present case is not one of prohibiting interstate commerce or licensing it on conditions which restrict it or obstruct it. Cf. *Crutcher* v. *Kentucky*, 141 U. S. 47; *Dahnke-Walker Co.* v. *Bondurant*, 257 U. S. 282. For here the regulation is applied to one who is not himself engaged in the transportation but who acts only as broker or intermediary in negotiating a transportation contract between the passengers and the carrier. The license required of those engaged in such business is not conditioned upon any control or restriction of the movement of the traffic interstate but only on the good character and responsibility of those engaged locally as transportation brokers" (313 U. S. at pp. 114-115).

In line with the principles applied in the decisions cited above, we submit that the state of destination, while it has the right to regulate rates in direct industrial sales of natural gas in interstate commerce, does not have authority to prohibit such sales or to treat them as a local privilege.

There is the same distinction in the state of origin. A state where natural gas is produced has authority to regulate the well-head price as a means of conservation, even though almost all of the gas moves in interstate commerce, *Cities Service Gas Co.* v. *Peerless Oil & Gas Co.*, 340 U. S. 179 (1950); but the state of origin has no right to prohibit the movement of gas in interstate commerce, *West* v. *Kansas Natural Gas Co.*, 221 U. S. 229 (1911).

III.

The Michigan statute, as construed and applied in this case, gives the State Commission power to exclude interstate commerce in natural gas, in order to limit competition or to serve local economic interests. This is in conflict with the Commerce Clause.

The State Commission ordered Panhandle not to sell natural gas to any industrial consumers in municipalities already being served by a public utility, until it should have obtained (if it could) a certificate of convenience and necessity from the Commission. In the particular case complained of, Michigan Consolidated Gas Company was already serving the municipality in which the Ford Motor Company plant was located (R. 32; 259-260).

Thus the order was an assertion of State power to block interstate commerce in natural gas in any area where local commerce in the same commodity might be adversely affected.

It is fundamental that a state may not exclude interstate commerce where either the purpose or the effect is to protect local business from competition.

West v. *Kansas Natural Gas Co.*, 221 U. S. 229 (1911);
Buck v. *Kuykendall*, 267 U. S. 307 (1925);
Bush & Sons v. *Maloy*, 267 U. S. 317 (1925);
Allen v. *Galveston Truck Line Corporation*, 289 U. S. 708 (1933);
Baldwin v. *Seelig*, 294 U. S. 511 (1935);
Hood & Sons v. *DuMond*, 336 U. S. 525 (1949);
Dean Milk Co. v. *Madison*, 340 U. S. 349 (decided January 15, 1951).

The *Buck* case, *supra*, is directly in point. A Washington statute prohibited common carriers for hire from using the highways by auto vehicles between fixed termini or over regular routes, without having first obtained a certificate of public convenience and necessity. Buck sought to operate an auto stage line over the Pacific Highway between Seattle, Washington, and Portland, Oregon, as a common carrier for interstate passengers and express. He was refused a certificate on the ground that adequate service was already being furnished.

It was held that the statute, so construed and applied, was inconsistent with the Commerce Clause. Mr. Justice Brandeis wrote (267 U. S. at pp. 315-316):

> "The provision here in question is of a different character. Its primary purpose is not regulation with a view to safety or to conservation of the highways, but the prohibition of competition. It determines not the manner of use, but the persons by whom the highways may be used. It prohibits such use to some persons while permitting it to others for the same purpose and in the same manner. * * * Thus, the provision of the Washington statute is a regulation, not of the use of its own highways, but of interstate commerce. Its effect upon such commerce is not merely to burden but to obstruct it. Such state action is forbidden by the Commerce Clause."

The force of the *Buck* case was not weakened by *Clark* v. *Poor*, 274 U. S. 554 (1927), where, as shown by Mr. Justice Brandeis, the State did not contend that it had discretionary power to withhold a certificate of public convenience and necessity. He said (p. 556):

> "It appeared that while the Act calls the certificate one of 'public convenience and necessity', the Commission had recognized, before this suit was

> begun, that under *Buck* v. *Kuykendall*, 267 U. S. 307 and *Bush* v. *Maloy*, 267 U. S. 317, it had no discretion where the carrier was engaged exclusively in interstate commerce, and was willing to grant to plaintiffs a certificate upon application and compliance with other provisions of the law."

Hood & Sons v. *DuMond, supra,* is also a direct precedent. A New York statute forbade milk dealers to buy milk from producers unless licensed by the Commissioner of Agriculture and Markets. The statute required the Commissioner to find, before issuing a license, that the license would not tend to "destructive competition in a market adequately served." Hood, who bought milk in New York for shipment to Massachusetts and sale there, was refused a license for a new receiving station at Greenwich on the ground that such new station would tend to reduce the volume of milk to be received at existing stations in the Greenwich area operated by distributors serving New York markets and so would result in destructive competition in a market already adequately served. It was held that the New York statute, so applied, violated the Commerce Clause. Mr. Justice Jackson, speaking for the Court, said (336 U. S., at p. 533):

> "This distinction between the power of the State to shelter its people from menaces to their health or safety and from fraud, even when those dangers emanate from interstate commerce, and its lack of power to retard, burden or constrict the flow of such commerce for their economic advantage, is one deeply rooted in both our history and our law."

And later, at page 538:

> "In *Buck* v. *Kuykendall*, 267 U. S. 307, the Court struck down a state act because, in the language of Mr. Justice Brandeis, 'Its primary purpose is not regulation with a view to safety or to conservation

> of the highways, but the prohibition of competition.' The same argument here advanced, that limitation of competition would itself contribute to safety and conservation, and therefore indirectly serve an end permissible to the State, was there declared 'not sound'. 267 U. S. 307, 315. It is no better here."

From the majority opinion in the Michigan Supreme Court, with its expressed fear that Panhandle might "skim the cream off the local market for natural gas in the municipality where the intervening defendant now provides such services" (R. 568), it is plain that the interest of the State was to prevent Panhandle from competing for local business.

The dissenting justices saw the issue clearly (R. 571-572):

> "So understood, this becomes, then, a plain case of the commission asserting the power to prohibit these sales in interstate commerce if they compete with the sales and business of local utilities. It is no mere coincidence that defendant's cease and desist order, by its own terms, expressly limits its restraint upon plaintiff to operations in municipalities already being served by some other public utility. * * * Prevention of competition with local commerce by interstate commerce is an objective, in and of itself, not permitted under the 'commerce clause' to be accomplished by a state."

In *Stanford Law Review*, February 1951, pages 335-341, the decision of the Michigan Supreme Court has been criticized on this ground. The concluding sentence of the comment is this:

> "Clearly, the doctrine that a state may not license an interstate business in order to protect local business from outside competition should have controlled the result."

IV.

The local authority asserted in this case would seriously disrupt interstate flow of natural gas. Any local interest is outweighed by the national interest in the free flow of natural gas in interstate commerce.

We have already pointed out that a state may not impose a requirement for a certificate of public convenience and necessity as a condition precedent to the right to make sales in interstate commerce. An unbroken line of cases in this Court so holds. We have also outlined why this is particularly the case where the purpose or effect is to prevent interstate commerce from competing with local business. Here too the decisions of this court are controlling.

These principles, we submit, suffice for decision. The same result is reached on a broader ground—the national interest and the local interest involved, and the effect of the control attempted by the state on interstate commerce in natural gas. See *Illinois Natural Gas Co.* v. *Central Illinois Public Service Co.*, 314 U. S. 498, 506 (1942); *Parker* v. *Brown*, 317 U. S. 341, 362 (1943); *Southern Pacific Co.* v. *Arizona*, 325 U. S. 761, 768-770 (1945).

The Natural Gas Industry in Interstate Commerce.

The importance of the national interest in transportation of natural gas is plain from recent reports of the Federal Power Commission.

The rapid growth of the natural gas industry—"the new giant in the utility field"—that commenced at the close of the Second World War continued at an increased pace in 1949 and 1950. Natural gas utility sales in 1949 passed the 3 trillion cubic foot mark for the first time.

Of that total 1.8 trillion cubic feet were used for industrial purposes. *1950 Report of Federal Power Commission,* pages 1, 5, 12-13.

Natural gas sales by "natural gas companies" for 1949 were much higher than utility sales. Reports for the year 1949 of 121 natural gas companies which for administrative purposes are "natural gas companies" within the meaning of the Natural Gas Act show that in 1949 total gas sales of those companies were 4.44 trillion cubic feet, of which 1.073 trillion cubic feet or 24.2 percent constituted industrial sales. *Federal Power Commission, Statistics of Natural Gas Companies 1949.* These are total sales of natural gas by "natural gas companies" and include intrastate as well as interstate sales.

Likewise, interstate movement of natural gas has experienced a most significant expansion. In 1938, 636 billion cubic feet were transported in interstate commerce. In 1947, 1.3 trillion cubic feet were transported. *1949 Report of Federal Power Commission,* page 11. In 1948 the volume in interstate commerce had grown to 1.7 trillion cubic feet, and the volumes for 1949 and 1950 are estimated to have been much larger. *1950 Report of Federal Power Commission,* pages 17-18.

Recent extensions of interstate pipe lines have carried huge quantities of natural gas from the Southwestern states (where 88 percent of the gas reserves are located, *1949 Report of Federal Power Commission,* p. 14) to the large centers of population on the Atlantic seaboard; and projects lately authorized will supply New England markets. The network of long distance pipelines from the producing fields in the Southwest now covers almost the entire nation. *1950 Report of Federal Power Commission,* pages 1, 15.

Clearly, the free flow of this huge volume of natural gas in interstate commerce from the gas fields to the distant markets is of vital concern to the nation. The problems are national in character.

The load factor.

One of the economic problems in operating natural gas transmission lines relates to the seasonally fluctuating nature of the demands for natural gas as fuel. In particular, househeating demands for natural gas, which have expanded tremendously in recent years, provide an extremely low load factor, between 20 and 30 percent. *1948 Report of Federal Power Commission,* page 84; *Natural Gas Investigation, Report of Commissioners Smith and Wimberly,* page 255. To offset this highly seasonal demand and to maintain higher load factor operations for the system, natural gas pipe lines endeavor to attach industrial loads, where the load factor on a diversified basis generally runs to 75 or 80 percent. *Natural Gas Investigation, Report of Commissioners Smith and Wimberly,* pages 255, 292. See also *Natural Gas Investigation, Report of Commissioners Olds and Draper,* pages 98-116. The value of industrial sales as a factor in keeping down the cost of the delivered product to all groups of consumers has been recognized by the Federal Power Commission. *Matter of Mississippi River Fuel Corporation,* 6 F. P. C. 280, 288 (1947). See also *Panhandle Eastern Pipe Line Co.* v. *Federal Power Commission,* 324 U. S. 635, at pages 639-648 (1945).

Effect of State Stoppage of Direct Industrial Sales.

Natural gas transported in interstate commerce by pipe line is disposed of in two ways: (a) by sales to distributing utilities for resale, (b) by direct sales to industrial

consumers. But whether the gas is to be sold for resale or is to be sold directly to industrial consumers, it is transported in the same pipe line (R. 255; 257-258). State stoppage of natural gas to be sold directly to industrial customers would drastically diminish the total flow of gas in interstate commerce.

The action of Michigan in this case is a direct challenge to the flow of interstate commerce in natural gas for sale direct to industrial customers. And because of the value of high load factor operations the impact would also be felt on interstate commerce in gas to be sold for local resale, not merely in Michigan but in all other states served by the Panhandle pipe line.

If Michigan can prohibit this particular interstate pipeline company from making direct industrial sales of natural gas in interstate commerce, the other 47 states have the same power as to all interstate pipe-line companies. The exercise of that power by the states, some for one reason, others for another, would severely impede the interstate commerce in natural gas, we submit, and would gravely prejudice the national interest in keeping the stream of natural gas unobstructed by local dams.

The local interest.

The end to be served by the requirement of a discretionary certificate, the Michigan Supreme Court holds, is to prevent Panhandle from taking away profitable industrial business from a local utility to the detriment of the utility's other customers. The need for such state action vanishes under scrutiny.

First, Michigan's rate regulatory authority will prevent Panhandle from charging unreasonable rates on direct industrial sales in Michigan.

Second, as pointed out above, sales to industrial customers, by permitting high load factor operations, serve to reduce the unit cost of gas to other customers.

Third, Panhandle, by reason of Section 7(b) of the Natural Gas Act cannot reduce deliveries to the local utility in order to take over any of its customers without a finding by the Federal Power Commission that public convenience and necessity is served by such action.

Fourth, the Federal Power Commission has ruled that Panhandle may not make a new direct industrial sale without a finding by the Federal Power Commission that such sale will not impair service to other customers.

City of Detroit v. *Panhandle Eastern Pipe Line Company*, 5 F. P. C. 43 (1946); R. 295-303.
Matter of Panhandle Eastern Pipe Line Company, 7 F. P. C. 1121 (1948).

It is thus plain that there is no need for Michigan to require an interstate pipe line company to obtain from a state agency a certificate of public convenience and necessity prior to selling natural gas to industrial customers in Michigan.

In any event, there is not the compelling local interest at stake which would justify such a bald interference with interstate commerce. The Michigan statute is not a reasonable response to an urgent local need.

Southern Pacific Co. v. *Arizona*, 325 U. S. 761 (1945).
Dean Milk Co. v. *Madison*, 340 U. S. 349 (1951).

V.

The state action is also a trespass on the authority of the Federal Power Commission over interstate transportation of natural gas by act of Congress.

The order of the Commission by its terms forbade sale and delivery of natural gas to direct industrial consumers. But interstate transportation of natural gas was also in substance forbidden. The connection between transportation and sale is immediate. No sale, no transportation. See *Baldwin* v. *Seelig*, 294 U. S. 511, at page 521 (1935). In the case of the Ford Motor Company, the transportation so forbidden was of a volume of 25 million cubic feet a day.

State encroachment on transportation of natural gas interstate is incompatible with the express provisions of the Natural Gas Act. Section 1(b) of the Act lodges authority over "transportation of natural gas in interstate commerce" with the Federal Power Commission. The exclusion of state interference with interstate transportation of natural gas is manifest.

> *Illinois Natural Gas Co.* v. *Central Illinois Public Service Co.*, 314 U. S. 498 (1942).
>
> "Here, as elsewhere, once a company is properly found to be a 'natural-gas company', no state can interfere with federal regulation." *Federal Power Commission* v. *East Ohio Gas Co.*, 338 U. S. 464, 473 (1950).

VI.

The majority opinion in the Michigan Supreme Court was in error.

The majority opinion took the ground that the ruling of this court in *Panhandle Eastern Pipe Line Co.* v. *Indiana Public Service Commission,* 332 U. S. 507 (1947), completely controlled the present case (R. 560, 568). It quoted from the opinion in that case at length. No other authority was mentioned.

It is true that in background the two cases are alike. But the conditions in the foreground are altogether different.

In the case that came here four years ago from Indiana the issue was the right of a state to regulate rates on sales of natural gas in interstate commerce when made directly by the pipe line company to an industrial consumer—nothing more. The order of the Indiana Commission complained of was an order to file tariffs, rules, reports, etc.—the first stage in the rate regulating process, as this Court noted in its opinion (332 U. S. at p. 512).

In the present case the question is the right of a state to prohibit the making of sales of natural gas in interstate commerce directly to industrial consumers except on the approving nod of the state.

The minority opinion in the Michigan Supreme Court noted the fundamental difference between the two cases (R. 569-570). The dissenting justices, in discussing the opinion in the *Indiana* case, said

> "Nowhere in the opinion is it suggested that the Indiana Commission sought to require, or that the court was upholding the right of the commission to require, plaintiff to obtain a certificate of public convenience and necessity before making in Indiana, the sales in interstate commerce there involved."

The majority opinion took the further ground that if the State Commission could not control whether Panhandle should make a direct industrial sale in interstate commerce, then Panhandle might make sales of that character without either Federal or State control (R. 568).

There are two answers.

First: In assuming that Federal control is non-existent and that consequently State control must exist, the majority opinion overlooked the fact (although it was in the record and was also noted in our brief) that on complaint by both appellees in the instant case (R. 409-410; 410-411) the Federal Power Commission has asserted control over this very transaction—sale and delivery of natural gas to Ford Motor Company (R. 295).

City of Detroit v. *Panhandle Eastern Pipe Line Company*, 5 F. P. C. 43 (1946).

In that case the Federal Power Commission, while it conceded it had no authority over direct industrial sales as such, held that by reason of its jurisdiction over transportation facilities used in carrying gas in interstate commerce it had authority to prevent the use of such facilities for sale and delivery of natural gas to a new customer (5 F. P. C., at page 50; R. 302-303). It based its order (R. 304-305) on a finding of fact that delivery of natural gas to Ford would prejudice the service to which existing customers of Panhandle were entitled.

Second: The argument proves too much. No one would seriously contend, we take it, that the State Commission had power to order Panhandle in conduct of its interstate business to make direct industrial sales to various Michigan industries. The invasion into Federal control over transportation in interstate commerce and over sales in inter-

state commerce for resale to consumers would be too damaging to be tolerated. Yet it is equally clear that the Federal Power Commission, with the powers conferred on it by the Natural Gas Act, would not have power to order an interstate pipe line to make a direct industrial sale.

VII.

Panhandle was not required to apply for a certificate of public convenience and necessity before seeking relief on constitutional grounds from the Commission's order.

The Michigan statute, as construed and applied in this case, treated the right to transport, sell and deliver natural gas in interstate commerce as a local privilege to be permitted or prohibited by the State Commisson in its discretion. For the reasons already outlined by us, this was an infringement of the right to engage in interstate commerce under the Commerce Clause, and Panhandle was warranted in petitioning for statutory review of the Commission's order to "cease and desist".

In the cases cited under Point II, relief from the local statute or ordinance requiring license or certificate was granted by reason of the Commerce Clause, without requiring plaintiff to apply for license or certificate. *Crutcher* v. *Kentucky, supra; Barrett* v. *New York, supra; Sault Ste. Marie* v. *International Transit Co., supra; Mayor of Vidalia* v. *McNeely, supra.*

In *Bush & Sons* v. *Maloy, supra,* the Court stated (267 U. S., at pp. 324-325):

> "The state action in the *Buck case* was held to be unconstitutional, not because the statute prescribed an arbitrary test for the granting of permits, or be-

cause the Director of Public Works had exercised the power conferred arbitrarily or unreasonably, but because the statute as construed and applied invaded a field reserved by the Commerce Clause for federal regulation."

VIII.

The judgment of the Supreme Court of Michigan should be reversed.

Respectfully submitted,

ROBERT P. PATTERSON,
CLAYTON F. JENNINGS,
ROBERT M. MORGENTHAU,
Attorneys for Appellant.